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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANN HESTER FUERST,

Plaintiff and Appellant,

v.

CAROLYN MALLECK et al.,

Defendants and Respondents.

D073386

(Super. Ct. No. 37-2012-00151855-
PR-TR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Affirmed.

Ann H. Fuerst, in pro. per., for Plaintiff and Appellant.

Goodwin Brown Gross & Lovelace and Craig Gross for Defendants and Respondents.

INTRODUCTION

This is the second appeal by Ann Hester Fuerst (Ann) in a proceeding regarding the Charles E. Fuerst Trust (Trust), executed by Ann's deceased husband, Charles Edward

Fuerst (Charles) in August 1991.¹ In a prior appeal, we affirmed a 2012 order dismissing Ann's initial petition which challenged the validity of amendments to the Trust based on her claim Charles was incapacitated at the time he executed the amendments. We affirmed the judgment finding we had no jurisdiction to consider the issue because the appeal was not timely filed. (*Fuerst v. Kirby* (Aug. 21, 2014, D064385) [nonpub. opn.].)

This appeal follows a final order of distribution which approved trustee fees and provided instruction for the final distribution of the trust. Ann's briefs are, at best, difficult to follow. To the extent she continues to challenge the validity of the Trust amendments based upon the capacity of Charles, we have no jurisdiction to consider her claim because she did not timely appeal a 2015 order determining the validity of the amendments. To the extent she attempts to challenge the fee and distribution order, she fails to support her contentions with reasoned argument and legal authority with citations to the record. Therefore, we deem the issues forfeited. Even if we did not deem the issues forfeited, substantial evidence supports the findings of fact upon which the court exercised its discretion in approving the final distribution. Because Ann has not met her burden of establishing the court abused its discretion, we affirm the order. We deny, however, the sanction motion of cotrustees Carolyn Malleck and Steven Fuerst (Trustees).

¹ We use first names for clarity because some of the parties and the decedent share a surname. No disrespect is intended.

BACKGROUND

Charles executed the Trust in August 1991. Charles amended the Trust several times over the years. He executed an Eighth and Consolidated Amendment to the Trust in March 2011 revoking all prior amendments. In June 2011, shortly before his death, he executed a Ninth Amendment to the Trust, republishing and ratifying the Eighth and Consolidated Amendment except for the designation of the trustee. The Ninth Amendment appointed two of his children, Steven Charles Fuerst and Carolyn Elizabeth Fuerst Malleck, as cotrustees (trustees) in place of Ann. Charles died in August 2011.

Ann filed a petition for probate of Charles's will and for letters testamentary in a separate case at the end of July 2012. (San Diego Super. Ct. No. 37-2012-00151837-PR-PW-CTL.)

Shortly thereafter, on August 1, 2012, Ann filed an unverified petition initiating this action. The petition was entitled "Petition of Direct Will Contest Concerning Trust Administration Determine Validity of Purported Protected Documents; Suspend and Remove Acting Co-Trustees, Predecease 3 Beneficiaries, On Grounds of Lack of Decisional Capacity, Undue Influence, & Fraud: Rule Fiduciary with Misconduct and Con[f]irm Appointment of Ann Fuerst As Personal Representative of the Estate; For Other Relief." Ann named three of Charles's children (Carolyn, Steven, and Thomas) as defendants along with attorney John Kirby. Among the lengthy allegations, Ann claimed Charles was mentally incapacitated when he executed the Eighth and Ninth Amendments.

Attorney Kirby filed a demurrer to the petition. In its October 2012 ruling, the court struck, on its own motion, Ann's petition because it was not verified as required by

Probate Code section 1021, subdivision (b) and because the petition improperly intermingled challenges regarding both the will and Trust instruments.²

Thereafter, Steven and Carolyn applied ex parte for the issuance of a certificate of trustee appointment. The court granted the request and ordered the clerk to issue the certificate. The clerk of the court issued a certificate of trustee appointment certifying that Carolyn and Steven were duly appointed and acting trustees under The trust.

Ann moved to vacate the order granting the request for a certificate of trustee appointment seeking to remove Carolyn and Steven as trustees, again claiming Charles was incapacitated when he executed the Ninth Amendment. The court denied Ann's motion to vacate the certificate of trustee appointment. The court noted Ann's motion was essentially a request to remove Carolyn and Steven as trustees because she was challenging the validity of the Ninth Amendment to the Trust on the grounds of "decisional incapacity" and "undue influence." The court determined her challenge was procedurally defective because it was brought as a motion rather than as a petition required by the Probate Code, the California Rules of Court, and the San Diego Superior Court Rules.

² Although moot, the court sustained Kirby's demurrer with leave to amend noting a proceeding pertaining to the Trust was not the proper forum for asserting tort-based claims against the attorney who had no claim or interest in the Trust or estate.

Based upon an ex parte request by Kirby, the court ordered Ann's petition dismissed on December 18, 2012. The court entered a judgment in favor of all defendants on February 8, 2013 and ordered Ann to pay costs.

Ann filed a motion in May 2013 to set aside the judgment claiming she did not appear at the October 2012 hearing due to health issues. The court denied Ann's motion to set aside the judgment as untimely under Code of Civil Procedure section 473, subdivision (b). The court again noted clear defects in the petition by combining trust and estate matters and stated her appearance at the hearing would not have altered the court's decision because her petition was not viable.

Ann appealed the order striking her petition in August 2013. We affirmed the judgment finding we had no jurisdiction because the appeal was not timely filed. (*Fuerst v. Kirby* (Aug. 21, 2014, D064385) [nonpub. opn.].)

In the meantime, trustees filed a petition for instructions and order on final distribution. Trustees sought confirmation regarding whether the home in which Ann resided was an asset of the Trust and whether she had a right of occupancy as well as instructions regarding the distribution of assets from an American Century account and oil and gas interests.

Ann filed a competing petition entitled "Petition Regarding the Internal Affairs of Trust; For an Order Determining the Assets of the Trust; and for an Order Establishing a Repair Fund." Ann continued to challenge the validity of the Eighth and Ninth Amendments. Ann's petition sought an order declaring: (1) the home as an asset of the

Trust, (2) Ann had a life estate in the home or an option to sell, and (3) establishment of a major repairs fund of \$25,000 for repairs to the home.

At a trial in July 2015, the court received evidence regarding the Trust documents, including the Eighth and Ninth Amendments, as well as documents submitted by Ann pertaining to Charles's mental capacity. The court considered arguments of the parties. The court found the Eighth and Ninth Amendments to the Trust were "not subject to challenge and therefore are presumptively valid." The court also determined the Eighth Amendment effectively revoked a prior trust as to the home. The Court found Ann owned 1 percent of the property and had a right of occupancy. Ann did not appeal this order.

Litigation among the parties continued over the years. In May 2016, the court denied another petition by Ann to declare Charles was physically and mentally incapacitated when he executed testamentary documents. The court stated it had ruled on the issue in July 2015 and the issue was res judicata of the first petition. Additionally, the court denied Ann's petition for a quasi-community property claim to American Century Accounts as barred by the statute of limitations and laches.

In September 2016, the court tried various issues on the parties' competing petitions. On Trustees' petition, the court found Ann breached her duties as trustee and ordered her to pay the trust \$16,978.62. The court dismissed with prejudice Ann's petitions for end of life funds and reimbursement of funeral expenses and administration costs. The court granted Ann's request for an order establishing a repair fund and Trustees' petition for instructions by ordering the parties to cooperate in obtaining an

equity loan. The court ordered Ann to provide a written request with a major repair estimate.

After a further trial in November 2017, the court granted Trustees' petition for instructions and order on final distribution. It approved Trustee's fees in the amount of \$67,841.25 to Carolyn and \$59,985 to Steven. It ordered any oil and gas interests received by the Trust to be distributed in equal shares to Carolyn, Steven, and Thomas. It ordered the remaining Trust assets to be distributed pursuant to a plan of distribution submitted by Trustees. This included a distribution of \$43,796.98 to Ann, which represented a distribution of \$62,273.44 less \$18,476.46, which is the amount owed by Ann for prior breaches plus interest. Ann filed this appeal from the November 30, 2017 order.

DISCUSSION

I

Ann's briefs focus primarily on her allegations that Charles was mentally incapacitated when he executed the Eighth and Consolidated Amendment and the Ninth Amendment. In her reply brief, Ann states the court's July 2015 ruling that the Eighth and Ninth Amendments are presumptively valid, "is at the heart of this appeal." (Underlining omitted.) She contends all findings of the court would be changed if the court had determined Charles to be incapacitated.

We have no jurisdiction to review this issue because the July 2015 ruling determining the validity of a trust provision was a final appealable order. (Prob. Code, §§ 1304, 17200, subd. (b)(3).) "It is well established that '[a]ppeals which may be taken

from orders in probate proceedings are set forth in ... the Probate Code, and its provisions are exclusive.' " (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125–1126.) " 'The orders listed as appealable in the Probate Code must be challenged timely or they become final and binding.' " (*Estate of Reed* (2017) 16 Cal.App.5th 1122, 1127.) " 'They may not be collaterally attacked in a subsequent appeal from the final order of distribution.' " (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1450, fn. 5.)

II

Ann also appears to challenge the fee and distribution orders of the court and asks us to award her damages. However, none of Ann's arguments are supported by reasoned argument and legal authority and are deemed waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

The appellant must "present argument and authority on each point made" (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; Cal. Rules of Court, rule 8.204(a)(1)(B)) and cite to the record to direct the reviewing court to the pertinent evidence or other matters in the record that demonstrate reversible error. (Rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) It is not our responsibility to search the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) Any point raised that lacks citation may, in this court's discretion, be deemed forfeited. (*Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 287 citing *Del Real*, at p. 768.) A self-represented party is to be treated like any other party and is entitled to the same, but no

greater, consideration than other litigants having attorneys. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

In any event, "the probate court enjoys broad equitable powers over the trusts within its jurisdiction." (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99.) "We review the factual findings on which the trial court based its exercise of discretion under the substantial evidence standard." (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 231.) "Under the deferential substantial evidence standard of review, findings of fact are liberally construed to support the judgment or order and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Ibid.*) The court considered the evidence and arguments presented by the parties. The court overruled Ann's objections and approved the request for Trustees' fees and the plan of final distribution. We conclude there is substantial evidence to support the court's factual findings and the court did not abuse its discretion.

III

Trustees ask us to impose sanctions in the amount of \$6,532.50 against Ann for attorney fees expended defending what they claim is a frivolous appeal. We decline to do so. Although we agree Ann's briefs are difficult to decipher and she has repeatedly challenged orders contending Charles lacked capacity to execute the Eighth and Ninth Amendments, we cannot say the appeal from the final order of distributions was so indisputably without merit that any reasonable attorney would agree it was totally devoid of merit or that it was subjectively prosecuted solely for an improper purpose. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–650.)

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

O'ROURKE, J.